U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 29 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a board and care facility. It seeks to employ the beneficiary permanently in the United States as a residential care administrator. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The director determined that the evidence failed to establish the petitioner's ability to pay the proffered wage. On appeal counsel states that the director erred by failing to consider the applicant's evidence other than tax returns.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter turns, in part, on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The petition's priority date in this instance is February 18, 1997. The beneficiary's salary as stated on the labor certification is $4,114.93 per month or $49,379.16 per year.

The evidence relevant to the petitioner's ability to pay the proffered wage which was submitted for the record initially and in response to a request for evidence (RFE) issued by the director includes the following: copies of Form 1040 U.S. individual income tax returns for the petitioner's owner and his wife for the years 1997 through 2002; copies of real estate sale and mortgage documents reflecting transactions involving the petitioner's owner in 2001 and 2002; copies of invoices dated in 2001 and 2002 for foster home care provided by the petitioner's owner; copies of quarterly audit statements of bank accounts of the petitioner's owner for the years 1997 through 2002 and for the first quarter of 2003; and copies of Form 1040 U.S. individual income tax returns of the beneficiary for 1999, 2000 and 2001.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits additional copies of documents submitted previously. Counsel also submits for the first time on appeal a letter dated July 9, 2003 from the petitioner's owner and copies of recruitment documents for the offered position.

Counsel states on appeal that the tax return information relied upon by the director does not adequately reflect the business prospects of the petitioner and states that those business prospects are very good. Counsel also states that the petitioner's costs in acquiring real estate properties for expansion were the major reasons for the petitioner's low net profit in recent years. Counsel relies on *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

In determining the petitioner's ability to pay the proffered wage CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage.

In the present matter, the ETA 750B signed by the beneficiary on February 4, 1997 states that the beneficiary had been employed by the petitioner from January 1994 until the present. In his brief, counsel states that the beneficiary was paid in cash for that work, since the beneficiary lacked work authorization. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The Form 1040 U.S. individual income tax returns of the beneficiary in the record do not establish that the petitioner employed the beneficiary. Those tax returns show income of the beneficiary from a business which is described on the attached Schedule C's as "mental health." But nothing in the beneficiary's tax returns indicates the source of the funds received by the beneficiary in her "mental health" business. The beneficiary provides no business address or employer identification number for her business. No other evidence in the record supports counsel's assertions concerning the petitioner's employment of the beneficiary. The evidence in the record therefore fails to establish that the petitioner previously employed the beneficiary.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

For a sole proprietorship, CIS considers net income to be the figure shown on line 33, adjusted gross income, of the Form 1040, U.S. Individual Income Tax Return. The joint tax returns of the petitioner's owner and his wife show the following amounts for adjusted gross income: $40,863.00 for 1997; $40,004.00 for 1998; $39,467.00

for 1999; $32,899.00 for 2000; and $53,092.00 for 2001. In the years 1997 through 2000 the owner's adjusted gross income was insufficient to pay the proffered wage of $49,379.16. Only in 2001 was the adjusted gross income of the owner and his wife greater than the proffered wage. But in that year the amount remaining to the petitioner's owner after paying the proffered wage would have been only $3,712.84, a figure which would have been insufficient to pay the household expenses of the petitioner's owner and his wife.

For the foregoing reasons, the information on the tax returns of the petitioner's owner and his wife is insufficient to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Counsel's reliance on *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) is misplaced. That case relates to a petition filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and, also, a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances, parallel to those in *Sonegawa,* have been shown to exist in this case, nor has it been established that the years 1997 through 2001 were uncharacteristically unprofitable years for the petitioner.

The real estate documents in the record relate to transactions in 2001 and 2002, therefore they provide no explanation for the low net income of the petitioner's owner and his wife in the years 1997 to 2000.

The record also contains quarterly audit statements of bank accounts of the petitioner's owner for the years1997 through 2002 and for the first quarter of 2003. Those statements are apparently offered to demonstrate that the petitioner had sufficient cash flow to pay the proffered wage. However, the quarterly audit statements fail to establish that fact. An analysis of the quarterly audit statements shows the average of the quarterly closing balances for the owner's accounts to be $2,588.12. That average is not substantial enough to pay the proffered wage. Moreover, in nine of the quarters the closing balances totaled less than $1,000.00. The audit statements therefore do not show bank account balances which would be consistently sufficient to pay the proffered wage of $49,379.16 as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Similar considerations apply to the copies of invoices and other business documents in the record. Those documents provide corroboration that the petitioner is a business in the boarding and health care field, but they provide no evidence of additional funds available to the petitioner beyond those shown on the tax returns of the petitioner's owner and his wife and their statements on quarterly bank account balances.

Regarding the director's decision, the director correctly stated the adjusted gross income of the petitioner's owner and his wife for 1997 through 2001 and correctly found that the adjusted gross income in each of those years was insufficient to pay the proffered wage and also to pay the reasonable household expenses of the petitioner's owner during those years.

On appeal counsel submits a letter from the owner dated July 9, 2003 and copies of recruitment documents for the offered position. The recruitment documents are not relevant to the issue of the petitioner's ability to pay the proffered wage. However, the letter from the petitioner's owner does address the petitioner's ability to pay the proffered wage. In the letter the owner states that the petitioner has a waiting list for client admissions with no beds available. The owner also states that the petitioner is planning to open a larger facility to accommodate individuals needing the petitioner's service. The owner also states that the petitioner would suffer hardship if it lost the beneficiary as an employee.

The letter from the petitioner's owner provides no information on the petitioner's ability to pay the proffered wage as of the priority date for the period prior to the date of the letter. Moreover, the letter's discussion of the present business prospects of the petitioner lacks detail on those matter. The hardship which the petitioner might experience if it were unable to hire the beneficiary as a permanent employee is not relevant to the petitioner's ability to pay the proffered wage to the beneficiary. For the above reasons, the letter from the petitioner's owner fails to establish the petitioner's ability to pay the proffered wage during the relevant time period. The evidence submitted on appeal therefore fails to overcome the decision of the director.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.